Case Number: 2301681/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr RK Katwal	and	Asda Stores Limited

Held at Ashford on 10, 11, 12, 13 July 2017 & 14 July 2017 in chambers

Representation	**Claimant:**	Ms S Bowen - Counsel
	Respondent:	Mr J Meichen – Counsel

Employment Judge Wallis
Members Ms R Downer
Mr D Clay

RESERVED JUDGMENT

1. The discrimination claims are partly successful, to the extent set out below;

2. The Claimant was unfairly constructively dismissed by the Respondent;

3. The parties should write to the Tribunal office to request a remedy hearing if they are unable to settle the matter within 28 days of receiving this reserved decision.

REASONS

Issues

1. By a Claim form presented on 2 September 2017 the Claimant claimed unfair dismissal; disability discrimination; and notice pay. At a case management discussion on 8 November 2016 the issues were clarified as follows:

1 'By a claim form presented on 2 September 2016 the Claimant claimed unfair constructive dismissal and disability discrimination. The Respondent does not accept that the Claimant was a disabled person during his employment.

2 The Claimant signed a COT3 on 7 April 2015 but may seek to have it set aside. Meanwhile, the issues set out below refer only to events that took place after the date of the COT3. If the Claimant decides to pursue an application to set aside the COT3, and if he is successful, the list of issues will have to be expanded in respect of earlier events.

3 The issues will be as follows:-

Unfair constructive dismissal claim – section 95 Employment Rights Act 1996

a) did the Respondent act in such a way as to breach the implied term of trust and confidence by

   (i) refusing to make reasonable adjustments to the Claimant's duties;

   (ii) subjecting him to heavy-handed and intimidatory disciplinary and capability proceedings;

   (iii) causing extreme delay to the consideration of the Claimant's grievances, in breach of the Acas Code and in breach of the Respondent's grievance procedure;

   (iv) as a final straw, withholding company sick pay;

b) if so, was any such breach repudiatory;

c) if so, was any such breach the cause of the resignation;

d) was there any delay between any such breach and the resignation that would indicate that the breach had been waived;

e) if there was a constructive dismissal, was it fair or unfair in all the circumstances;

Disability – section 6 & schedule 1 Equality Act 2010

f) was the Claimant a disabled person during his employment with the Respondent and more particularly from 31 August 2010 or 31 March 2012;

g) if so, the following claims may proceed;

Disability discrimination-arising – section 15 Equality Act 2010

h) was the Claimant treated unfavourably by the Respondent

   (i) refusing to make reasonable adjustments to the Claimant's duties;

   (ii) subjecting him to heavy-handed and intimidatory disciplinary and capability proceedings;

   (iii) withholding company sick pay;

i) if so, was the treatment because of something arising in consequence of his disability, namely that he was unable to carry out picking duties;

j) if so, did the Respondent know, or could they reasonably have been expected to know, that the Claimant was disabled;

k) if so, was the treatment a proportionate means of achieving a legitimate aim;

Indirect discrimination – section 19 Equality Act 2010

l) did the Respondent apply a PCP that employees were expected to carry out 100% of their contractual duties;

m) if so, did that place disabled persons at a particular disadvantage, and did it place the Claimant at that disadvantage;

n) if so, was the PCP a proportionate means of achieving a legitimate aim;

Direct discrimination & Harassment claims– sections 13 & 26 Equality Act 2010

o) if the Respondent

(i) refused to make reasonable adjustments to the Claimant's duties;

(ii) subjected him to heavy-handed and intimidatory disciplinary and capability proceedings;

(iii) withheld company sick pay;

(iv) subjected him to unpleasant meetings where he was threatened with disciplinary action,

did such conduct amount to less favourable treatment of the Claimant because of his disability, compared to a hypothetical non-disabled person, and/or was it unwanted conduct related to disability;

Reasonable adjustments claim – section 20 Equality Act 2010

p) did the Respondent apply a PCP that employees were expected to carry out 100% of their contractual duties;

q) if so, did this place the Claimant at a substantial disadvantage compared to non-disabled persons, namely the disciplinary and capability proceedings, the events leading to constructive dismissal, and stress and anxiety;

r) if so, did the Respondent know, or could they reasonably have been expected to know, that the Claimant was disabled and that he was placed at that disadvantage;

s) if so, did the Respondent take reasonable steps to avoid that disadvantage (the Claimant suggests modifying his duties to avoid picking duties; amending his targets; and retraining/redeploying him);

Victimisation claim – section 27 Equality Act 2010

t) it is accepted by the Respondent that the Claimant's grievance in March 2016 was a protected act; the Claimant also relies on other grievances;

u) did the Claimant suffer detriments because of the protected act(s), namely the disciplinary and capability proceedings and company sick pay being withheld;

Time Limit – section 123 Equality Act 2010

v) if any of the claims were presented outside the time limit, is there evidence of conduct extending over a period that would bring the claim in time, or would it be just and equitable to extend time;

Breach of contract claim - Extension of Jurisdiction Regs 1994

w) is the Claimant entitled to notice pay;

Remedy – Employment Rights Act & Equality Act

x) if any of the claims is successful, what is the appropriate remedy.'

2. Subsequently, the Respondent accepted that the Claimant's back condition amounted to a disability within the meaning set out in the Equality Act. They also conceded that he was disabled at the material time and that they had knowledge of his disability. In addition, the Respondent conceded that the Claimant's grievance of 14 March 2016 was a protected act.

Documents and evidence

3. We had two lever arch files constituting the trial bundle. In addition, the Claimant had prepared a chronology and a cast list. There were written statements from each of the witnesses who gave oral evidence. Written submissions were produced by both representatives and in addition they gave oral submissions.

4. We heard evidence from the Claimant himself Mr Raj Kumar Katwal and then the Respondent's witnesses.

5. The Respondent's witnesses were Mr Darren Coker, the general manager of the Dartford ambient distribution centre; Mr Keith Moller, a department manager at Dartford; Mr Chris Pitman, the transport operations manager at Dartford until July 2016 and currently in the same role at the Erith depot; Mr Noel Boland, Transport operations manager at the Erith chilled distribution centre since Feb 2017 and previously the warehouse operation manager at Dartford; Mr Richard Fielding, general manager of the Didcot ambient distribution centre; Mr Gavin Town, General manager of the Erith chilled distribution centre; and Mr Craig Taylor, senior director for the food south logistic depots.

Findings of facts

6. The Respondent is a well-known name in the retail world, specialising in the sale of food, clothing, and home and leisure products. The Claimant worked as a

warehouse operative at the Dartford distribution centre from 1 July 20002 until he resigned with effect from 20 August 2016.

7. The role of the warehouse operative was to take delivery of goods and supplies, store goods, load stock using a fork lift truck, operate handling equipment, load and unload goods from warehouse vehicles, stack goods in the correct storage bay and keep the warehouse clean and tidy. Warehouse operatives were also expected to carry out picking, duties which consisted of lifting items from the storage units, which could include at floor level, with weights up to 25 kilos.

8 There was no dispute that the Claimant had a clear disciplinary record. In August 2010 he had an accident at work and as a result his evidence was that he was diagnosed with two prolapsed discs in his lower spine and he suffered ongoing chronic back complaints. His condition was further exacerbated by a road traffic accident on 31 March 2012. There was no dispute that since June 2011 the Claimant's duties were restricted. He was not expected to undertake picking duties. His duties were restricted to using a manual handling vehicle to take pallets of products off the storage racks and place them in the area where they would be picked, that is, selected for delivery elsewhere. In addition, he would also be involved in taking pallets of products that had been delivered to the warehouse and putting them into the storage racking.

9. There was no dispute that the term "picking" referred to three different areas of work. Flow pick related to the smaller boxes of the lighter products. It was the Respondent's case that those products rarely weighed over 5 kilos. The targets in the flow picking area were relatively high because of the small nature of the product containers. There was then the core pick area. Most of the operatives worked in that area, which included bottles of drink, canned vegetables, sweets, soap powders and nappies.

10. Thirdly, there was the cage pick which involved picking items onto cages which contained a mixture of heavy items and light items from core and flow. Mr Coker estimated that operatives typically spend 60% of their week picking.

11. The Tribunal was told that on 7 April 2015 the parties signed a COT3 agreement. At the case management discussion the Claimant was considering whether to challenge that agreement, but in fact he did not do so. The Tribunal therefore limited events to what happened from that point. However, the Tribunal noted from the Claimant's witness statement that there had been various complaints put to the Respondent by the Claimant by way of grievances. In 2014 his grievance was upheld at least in part. We heard no detailed evidence about that, but we noted that there had been some issues between the parties in the past and that these may have influenced both parties in as much as the Claimant thought that the Respondent would use any incidents in order to criticise the Claimant and the Respondent felt that the Claimant was difficult. An examination of the history of events, as shown below, demonstrated that both parties had reached those views.

12. Mr Coker moved to the Dartford depot in September 2014. He explained that of the 310 employees in the warehouse, around 70 of them were not undertaking full duties. He said that there had been problems with absences and taken together those two aspects meant that there were issues in job rotation. The Respondent explained that having had a health and safety report in 2012 they were keen to ensure that to avoid risk of musculoskeletal conditions operatives should not spend the entire working week picking and that there should be job rotation to give them a break from the physical aspect of the job. It have been agreed with the union that operatives should be multi-skilled to a minimum of two activities, to include for example picking and reach-truck driving so that their weekly tasks would involve a mixture of those tasks.

13. Mr Coker decided to undertake a review of all of the warehouse operatives at the depot to consider the type of work that they were undertaking and the reasons for the operatives not undertaking their full duties. He said that this plan had been discussed with the employees and there was no objection to it.

14. The Claimant had been off work from 7 November 2014 until 5 January 2015 with ongoing back problems. An occupational health report on 9 January 2015 said "he reports that he returned to his full duties and has not experienced problems and he continues taking medication to control his back pain. In my opinion, it appears he has adopted self-management of his pain in addition to medication." The management advice given by the occupational health adviser, Ms. Fish, was that "he has returned to full duties and it appears that there are no clinical barriers in him undertaking his contracted role providing he maintains self help measures. I advise flexibility with hospital appointment when they become available." The Tribunal found, and Mr Coker accepted in evidence, that this report was incorrect and the Claimant has not returned to "full duties". He had returned to the restricted duties that he had been undertaking since 2011. There was perhaps a misunderstanding by occupational health that the Claimant had returned to those restricted duties.

15. As a result of that report, and as part of the review, the Claimant was invited to what was called a restricted duties meeting with Mr Fisher, a manager, on 25 February 2015. He was accompanied by his trade union representative. He explained the error in the occupational health report. By letter of 17 March 2015 Mr Fisher set out the history of the matter and noted that the Claimant "believed the occupational health report was not accurate." He said that "as there was so much confusion the best solution would be to attend occupational health booked for 18 March 2015". The occupational health advisor was asked about the Claimant's capabilities. The letter added that following the meeting with occupational health, based on the report, he might be referred to Mr Coker to make a decision, which could be that a restriction was allowed or, if it could not be accommodated, then the Claimants employment may be terminated on the ground of capability.

16. The Claimant attended the occupational health appointment on 20 March 2015. The advisor, Mr Hawkins, set out the history of the matter and explained that he had talked through the specific details of each task listed on the referral form with the Claimant and his union representative, who had knowledge of those tasks, and

identified the difficulties that might arise. He said that it was difficult to assess based on verbal descriptions and he recommended a full workplace assessment which he said would enable a specific response for each activity. Pausing there, the Tribunal noted that the Respondent never did carry out that recommended workplace assessment. The Respondent's explanation for that omission was that the Claimant had then taken a career break. The Tribunal found that there was time before the Claimant took his career break to have undertaken that assessment, and alternatively, there was time when he returned from that break to undertake that assessment. It was not clear why that had never been carried out by the Respondent.

17. Mr Hawkins explained that based on his assessment of the Claimant's movements and pain on movement "I would expect that manual handling of loads above 5 kilos will cause an increase in his symptoms, specifically if his back is in a flexed (bent) position, or he is required to twist without moving his foot position or if lifting from ground levels." He confirmed that the Claimant was not currently fit for all of his duties as a warehouse operative and reiterated that a further work place risk assessment was required. His advice to management was that the Claimant did not undertake manual handling activity with weights exceeding 5 kgs unless his posture enabled him to maintain the natural curvature of his spine and his feet remained static i.e. no lifting when bending the waist and no twisting. He said that the Claimant would put himself and others, and the product, at risk if he lifted from ground level due to the spasms experienced in such postures. Mr Hawkins noted that the Claimant was to be seen in the pain clinic and that would give a better idea of he might be able to do if his pain became managed.

18. The restricted duties meeting with Mr Fisher resumed on 23 March 2015. Again, the Claimant was there with his union representative. The outcome letter of 10 April 2015 set out in brief terms what happened at the meeting and the Tribunal also had the hand written notes of that meeting. Mr Fisher noted the contents of the occupational health report and said "as this report clearly states that you cannot pick I will refer you to a final capability meeting with Darren Coker, this may have two outcomes". Those outcomes were that Mr Coker might make restrictions, although the Claimant will then have to perform 100% of the target for the restricted role. Alternatively, he might decide to terminate the Claimant's employment on the grounds of capability.

19. The letter stated that the workplace risk assessment would take place no later than 17 April 2015. The Tribunal noted that this did not happen.

20. On 25 April 2015 there was a natural disaster in Nepal where the Claimant's parents live. They were affected by that disaster. The meeting scheduled for 22 April 2015 did not take place for reasons which did not become clear to the Tribunal. At some point in time the Claimant travelled to Nepal. He emailed the Respondent from Nepal on 10 May 2015 and requested a career break. That was granted by letter of 1 June 2015, from 11th May 2015 until 19 September 2015. The Claimant was due to return to work on 21 September 2015.

21. The Respondent suggested to the Tribunal that the Claimant had "lied" about being in Nepal for the whole of the period of his career break. When the Claimant was questioned by the Respondent in cross examination as to whether he had been in Nepal to August 2015, he agreed he had and said that he did not return to the UK during that period. He then accepted that he had attended an appointment with the pain clinic on 22 July 2015. Respondent asked the Tribunal to consider the credibility of the Claimant. The Tribunal noted that English was not the Claimant's first language.

22. He appeared to the Tribunal to give answers to questions as best he could and tried to be helpful. The Tribunal considered that not much turned on when he had been in Nepal. The Tribunal found that certainly at some point he had visited Nepal. The Tribunal did not consider that what may have been a mistake about a date damaged to the Claimant's credibility. The Tribunal noted that when the pain clinic appointment letter was put to him, he immediately accepted it and said that he had made a mistake.

23. The pain clinic appointment was on 10 July 2015, the outcome letter was 22 July 2015. The consultant confirmed the history of the matter and noted that an MRI in 2014 demonstrated lumber discopathy without root compromise. He noted that the Claimant had pain in the lumber area on both sides or in the central area radiating to the left leg. His main problem was pain on bending and picking things from the floor. He had taken Pregablin and Amitriptyline but was now on co-codamol, 2-3 tablets a day, and naproxen. Otherwise he was fit and well and told the consultant that he tried to exercise as much as possible. The consultant said "most likely he has simple mechanical back pain, possibly coming from his lumbar discs. This should respond to reasonable exercise, simple pain killers and modifying his work activities, but occasionally a patient does need something extra to push things a bit. As such I am bringing him in as a day case patient to do a trial of epidural steroids and hopefully this would be enough together with all of the above".

24. The meeting with Mr Coker took place on 21 August 2015. The Tribunal saw the hand written notes of that meeting taken by a note taker. The Claimant explained his parents' situation in Nepal. He explained the history of his back injury. Mr Coker asked him what he could do and he explained that he could carry out the restricted duties. Mr Coker asked him how much picking he could do and the Claimant was recorded as saying "I can do picking, told not to do it". Mr Coker than asked him about his (previous) Tribunal claims. The Tribunal found that strange given that the matter had been settled. Mr Coker is then recorded as saying "why would I allow you back early, can't do job, can't perform role". The Tribunal found these comments hostile and heavy-handed in the circumstances. Mr Coker said that they would meet again after further occupational health report "to discuss your future."

25. The next occupational health appointment was on 8 September 2015. Notes were taken of that meeting by a note take and the Claimant was accompanied by his trade union representative. At the meeting was Ms Fish. From those notes the Tribunal found that Ms Fish appeared not to know very much about the Claimant's medical history, although she had seen him before, because she asked him why he

was on restricted duties, she also asked him about his diagnosis,. Very early on in the meeting she is recorded saying "I believe you could do mixed duties". The Claimant explained that he had been told not to lift heavy objects. She pointed out that her job was to assess him and that "I don't need any further information after this. I will say that after reviewing letter and after injection you could do rotation." The Claimant pointed out that the consultant had said he should not undertake heavy lifting. The Claimant suggested that Ms. Fish did not want to listen to him. Ms. Fish said that she understood that the Claimant had been told by the doctor that he could not pick and then could not bend. She then asked him about his medication. She wrote her report in his presence and the Claimant explained that he did not agree with it because everyone that he had seen said that he could not pick and he suggested that she would be responsible if anything happened to him.

26. Ms. Fish's report of 8 September 2015 suggested that 9 in 10 cases of lower back pain were due to prolapsed disc and that the usual advice was to keep active. She noted that the pain clinic consultant was to give him a steroid injection. She said "in my opinion following consultation and a review of the pain management report, he will benefit from combining picking and other tasks in a single shift… I advised that it is operationally feasible that he combines picking and other duties in a single shift from a week after his steroid injection. I have written and read the report in the presence of all parties. He states that he does not agree with my advice. I have explained to him that my advice is based on the evidence available today." The Tribunal noted that she did not notice that there had been no workplace risk assessment carried out and she did not say how the duties should be split and what weight limit if any should be applied to the Claimant. The Tribunal members are not medical experts but they found it not unreasonable that the Claimant continued to question that occupational health opinion because it appeared to differ greatly from the advice he had been given by the pain clinic consultant.

27. By letter of 17 September 2015, the Claimant was invited to a final capability meeting with Mr Coker. The letter explained that there would be a full review of the process to date, he would be able to respond to questions about his capability and performance and put forward any relevant points, and then depending upon the content of the meeting "we may consider the possibly of dismissal on the grounds of capability".

28. The meeting took place 21 September 2015. The Tribunal was able to see the hand written notes taken by the note taker. The Claimant was accompanied by a trade union representative. The background was discussed and the Claimant's disagreement about the most recent occupational health report. During the meeting Mr Coker said he had looked at the Claimant file and noted "you put in a lot of grievances". He suggested that there were four grievances between 2011 and 2014 and that they were "unfounded". The Tribunal noted that the grievance in 2014 was at least partly upheld and that the Claimant's manager, Mr Johnson, and Mr Muller apologised to the Claimant for their conduct. The Tribunal did not understand why Mr Coker found it necessary to raise this with the Claimant at a capability meeting. The Tribunal found that this gave an impression of a hostile meeting towards the Claimant. After the brief discussion of those grievances Mr Coker described the

Claimant as “disruptive”. He also raised the previous Tribunal claim presented by the Claimant, which had been settled. Mr Coker’s evidence was that the Claimant had interrupted him and didn’t listen to him, but the Tribunal found that the notes of the meeting do not support that.

29. The meeting ended with Mr Coker deciding to get further medical advice from the Claimant’s GP and from the pain consultant. The Claimant signed the relevant consent forms on that day. In fact, the Respondent never did approach the Claimant’s pain consultant for a report. Mr Coker’s explanation for that was that he thought the GP had all of the information. Given that there were points in the pain consultant’s report that it would have been helpful to clarify by way of questions from the Respondent and the provision of a detailed job description, the Tribunal rejected Mr Coker’s explanation about that.

30. On 23 September 2015, the Claimant had the steroid injection at the pain clinic.

31. There was some delay by the Respondent in sending the request for information to the Claimant’s GP. The letter was not sent until 12 November 2015. The GP responded relatively quickly on 27 November 2015. He said that the Claimant was still suffering lower back pain. He said that when he had the pain he was not able to “do his daily activities as he should e.g. showering, washing, hoovering, clothing etc”. He set out the pain killers taken by the Claimant on a regular basis and referred to the steroid injection and previous physiotherapy. He referred to the MRI scan in 2014. He said “he had pain clinic advice to avoid heavy lifting, bending, and he reported your occupational health agreed with this advice and mentioned the weight of not more than 5 kilos.” He referred to the accident in 2010 and previous MRIs. With regard to the questions about adjustments, he said “as mentioned by the pain clinic to avoid heavy lifting and bending as well as your specialist occupational health team who have seen him and given you advice and will follow him in the future”.

32. Mr Coker’s evidence to the Tribunal was that the GP did not say that the Claimant could not pick. He interpreted the GP’s letter to mean that the Claimant could do light lifting and bending. He considered that he could not do heavy lifting and bending, that was how he interpreted that letter. The Tribunal found that the letter was in fact at best ambiguous and the Respondent should have taken steps to clarify it. Mr Coker decided to wait for the Claimant’s next appointment at the pain clinic but took no steps to obtain a report from the pain consultant, for which the Claimant had signed a consent form back in September 2015. The Claimant attended the pain clinic on 15 December 2015. His back was reported “as still painful, but manageable”. He was taking the pain medication mentioned previously. The consultant said “I don’t think he would need any specific treatment in the pain clinic, clearly there is no point doing steroid injections and I would be rather reluctant step up his analgesics. He should keep active and move as much as possible and I have reassured him that with time his symptoms will settle, if not completely then at least to the level of minor nuisance. Basically, he should avoid anything that would put a strain on his lower back such as picking up any heavy loads, carrying heavy loads or pushing and pulling and he should be okay in the long term. I don’t think he

needs another appointment in the pain clinic. However, if things change I would be happy to see him again. Meanwhile I am sending him back to physiotherapy so they can design a proper exercise program to which he will adhere strictly". The Tribunal noted that the consultant did not give a specific weight restriction to help the reader to understand what he viewed as a "heavy load". The Tribunal understood that the report as suggesting that the Claimant was still suffering from symptoms in respect of back pain but that at some time in the future, unspecified, the symptoms "will settle". The Tribunal did not understand the report to be saying that the Claimant was now fit to carry out any type of duties.

33. The occupational health adviser Ms. Fish saw the Claimant on 15 January 2016. She had the previous pain clinic report and the Claimant showed her the most recent report during the course of that appointment. She set out in her report her opinion that "the consultant's advice on avoiding specific tasks appears to be based on the fact that he required reassurance that his pain was manageable. My opinion is that OH are better placed to evaluate suitability for work as we are in direct contact with management and fully understand the role and possible short term alternatives."

34. Pausing there, the Tribunal found this to be a rather defensive section of her report and a controversial analysis of the consultant's report. Her advice to management was that "there are no clinical barriers to him undertaking the full warehouse duties. As he believes the picking tasks within the warehouse are not compatible with his back pain despite my encouragement to discuss managing his symptoms at work to enable undertaking his substantive role (rotating tasks) it is for the business to consider how you can support him going forward". The Tribunal noted that she did not suggest that any reasonable adjustments would be necessary for the Claimant to carry out the full duties. Again, although not medical experts, it did appear to the Tribunal that this advice was contrary to the advice contained in the pain consultant's report. The Tribunal noted that the Respondent's evidence that occupational health reports provide guidance only, and case law supports that. They had not done the recommended work place risk assessment and they had not asked questions of the pain consultant, nor had they supplied him with a detailed job description. Was it reasonable for the Respondent to rely on the occupational health report given than the occupational health advisor was apparently familiar with the tasks to be undertaken? On balance, the Tribunal considered that it could not be said to be unreasonable in order to move things forward, but that in considering her report, it would also have been reasonable for the Respondent to take into account what the pain consultant had said and what the Claimant's GP had said, in addition to the Claimant's own views.

35. The Claimant was called for a meeting with Mr Stone, a warehouse department manager on 26 January 2016. Mr Moller was there to take the notes of that meeting. The Claimant was accompanied by his trade union representative. The Tribunal had the hand written notes of that meeting. Mr Stone suggested that there should be a rehabilitation plan because "we need to ensure that we rehabilitate you into full duties the right way. The next steps would be to make sure that you are refreshed on all aspects of picking and a well built rehabilitation plan is implemented and followed." The Claimant suggested that the Respondent was ignoring expert reports

and asked if they would be liable if anything should happen to him if he undertook picking. He wanted something in writing. Mr Stone explained that if he were to be retrained and there was a rehabilitation plan "I see no reason why you would be any different from any other colleague in terms of cover". He said that he wanted to see the Claimant work with the depot to build a plan and that if this did not happen "I see no option than to move towards a investigation". It was not explained what the "investigation" might be. The Claimant was recorded as saying "if you force me, I will pick and as I mentioned earlier you would be the responsible person". The Tribunal found that this was an indication that the Claimant had not, as the Respondent suggested, refused to carry out his duties; the Tribunal found that he was simply trying to explain why he feel that he would be unable to do so.

36. The Tribunal noted that the Respondent did not draw up a plan to show the Claimant what they had in mind so that he could give his comments on it. Neither did they send any proposed rehabilitation plan to his GP or to the pain consultant, both of which would have been the obvious way forward in the circumstances. The Tribunal found, from the notes, that it appeared that the meeting simply ended and that Mr Stone had not been particularly encouraging in respect of the Claimant's participation in rehabilitation plan. There was no outcome letter sent to the Claimant to explain what had been discussed and what the proposals were.

37. Meanwhile, the Claimant was having physiotherapy.

38. A further meeting took place on 23 February 2016, this time with Mr Moller. There was no invitation letter to the Claimant; the Tribunal found that he did not know what the meeting was to be about until he attended. In addition, the Tribunal found that the Claimant had never been told that the capability proceedings that had been started by the meeting with Mr Coker back in 2015 had now been abandoned by the Respondent and that they were now embarking on a disciplinary investigation. The Claimant attended the meeting with his trade union representative. The hand written notes record that Mr Moller said that the purpose of the investigation was "to understand why you feel you cannot carry out pick duties"; he did not refer to any disciplinary aspect., although it is right to say that the pro forma upon which the notes were written, and which the Claimant signed, is headed formal disciplinary investigation notes. There was a discussion about the meeting with Mr Stone. The Tribunal found it curious that the notes record that Mr Moller appears to ask about that meeting as if he was not there, when in fact he took the notes of that meeting. The medical advice was discussed to some extent. The Claimant is recorded as saying "yes I would go picking if my specialist who knows my condition who knows my condition better, if he recommends me to go picking I will". Mr Moller asked who his specialist was. That demonstrated to the Tribunal that there was a lack of preparation for this meeting. In addition, that was a clear indication and prompt to the Respondent to write to the Claimant's pain specialist asking for his opinion, given the difficulty of conflicting medical advice. The Respondent had consent from the Claimant to approach his specialist back in September 2015.

39. Mr Moller again during the course of the discussion asked the Claimant if he was prepared to "enter a rehab for picking". The Claimant in response said he been told to avoid put a strain on his lower back. Mr Moller said that a starting point would be the flow area. The Claimant said "unfortunately I cannot do that; I would try if I was okay. Only I know what pain I am carrying in my body and suffering…." He pointed out that every other occupational health report up to January 2015 had accepted that he could not undertake picking duties. He again reiterated that he could not bend. Mr Moller recited some of the history of the matter and said "there appears to be nothing substantial within these reports and as stated the pain is an individual experience that consultants and specialist seen (sic) unable to tell is that (sic) it is not manageable, I will ask again, are you prepared to try to pick." The Claimant explained that he had "a really bad back so that according to specialist advice I should not pick, so I am not going to put my health at risk."

40. There was an adjournment while Mr Moller considered whether the Claimant could be provided with a letter confirming that he would be covered if something happened while he was picking. Mr Moller then said he would not be providing an individual letter "your training and rehab programme would cover you." The Claimant said that he was formally requesting a consent form so that the Respondent could obtain a specialist report; he reiterated that he was complaining about the OH report.

41. The Tribunal noted that it was in fact the Claimant's GP who had said he should not bent, not the pain consultant. The Tribunal found it unsurprising that with so many reports there was some confusion on the part of the Claimant as to who had said what.

42. The meeting continued on 8 March 2016, again without any letter to the Claimant explaining the nature of the meeting or the reason for it. The Claimant's trade union representative pointed out that the Respondent had a consent form from the Claimant for them to approach his specialist in September 2015, although it also appeared that the representative was somewhat confused as to whether that report had been obtained by the Respondent. Indeed, Mr Moller appeared to think that the report had been obtained because as his answer to the trade union he says "the reports are available as stated". That was not correct. They had the pain consultant's report to the Claimant; they did not have a detailed report answering questions raised by the employer, which was why the Claimant had signed the consent form in September 2015.

43. The Tribunal noted that after a relatively brief discussion Mr Moller suggested that the Claimant had "become obstructive" although the Tribunal found that the notes do not demonstrate that he had done so. The Tribunal found that the Claimant was not being obstructive; he was frustrated at having to request once again that the Respondent ask for a report from his pain specialist and that he was having to do so since September 2015. it appeared that Respondent was simply not listening to him, despite a clear description of events from the Claimant and his trade union.

44. Mr Moller decided to refer the Claimant to a disciplinary hearing "for failing to carry out contractual duties. This could be construed as gross misconduct".

45. In his notes after the meeting, again Mr Moller described the Claimant as obstructive and said that he had all the reports necessary. The Tribunal found that he was not correct about that. In his note he also referred to his concern that the Claimant may have an "accident" or Incident while picking. He was asked why he put "accident" in quotes. He said in cross examination that he thought the Claimant might have an accident because he was resistant to picking. Then he was asked whether he thought this would be deliberate on the part of the Claimant; he said that there was potential for something to happen. When it was put to him that something could happen to anyone carrying out those duties, he said "yes, but the Claimant's back might go". It was therefore put to him whether the Claimant was unreasonable in expressing reluctance to carry out his duties if "his back could go" and he simply replied that those were his thoughts and he believed that an attempt could have been made by the Claimant. The Tribunal noted that in his witness statement (paragraph 12) Mr Moller said that he was concerned that the Claimant "may deliberately have an accident or incident whilst picking" if the Respondent gave him reassurances that they would be liable for any accident that he had. The Tribunal noted that Mr Moller was reluctant to endorse the view set out in his own note when giving evidence. We found that Mr Moller considered, without foundation, that the Claimant was in some way untrustworthy in respect of how he would approach his duties.

46. On 14 March 2016, the Claimant presented a grievance to the Respondent. He said that he considered that they were in breach of contract by subjecting him to a gross misconduct investigation based on his re-occurring medical condition. He said that Mr Coker had been bypassed by lower management and that the capability process has not been completed. He explained his disagreement with the OH advice. He referred to disability discrimination. He asked for the appropriate manager to consider his grievance in accordance with the grievance policy "because Darren Coker has failed to deal with the situation fairly".

47. There was a dispute at the Tribunal hearing as to whether the grievance was about Mr Coker. The Respondent said that it was not. The Claimant said that it was. The Tribunal noted that at no time did the Respondent tell the Claimant that they did not understand that his grievance was about Mr Coker; indeed, at the time the managers involved in the grievance accepted that the grievance *was* about Mr Coker. The Respondent's grievance policy provides that if the grievance is against the general manager, then a higher manager should consider that grievance. The Tribunal found that the Respondent failed to follow that policy throughout the grievance process. They did not provide a manager who was senior to Mr Coker. In addition, the Respondent's grievance procedure says that the grievance meeting "will be arranged normally within 5 days of receiving a written grievance". The Tribunal found that there was a clear and inexplicable failure by the Respondent to adhere to that timetable.

48. In addition, on 23 March 2016, the Claimant telephoned the Respondent's ethics helpline and complained of bullying and harassment by management since he sustained his accident at work. He explained briefly about the consultant's advice

about his back and the recent charge of gross misconduct. He suggested that his grievance had been referred back to him, although the Tribunal heard very little evidence about that. He asked for the helpline to look into it for him. The Tribunal found that if the Claimant was asked to re write his grievance, as his complaint appears to suggest, this was entirely unnecessary. The grievance was reasonably clear about the points raised. The Tribunal found that it was poorly handled.

49. On 30 March 2016 the Claimant received a response from the occupational health management to his complaint about Ms. Fish and her report of 15 January 2016. They said that Ms Glenn, the head of physiotherapy, had reviewed his file and confirmed that she fully supported the advice and recommendations made by Ms. Fish. They were therefore satisfied that "there are no clinical, ethical or professional conduct matters to be considered". Ms. Glenn's report was attached. She did not see the Claimant. She referred to the Claimant's concerns about his back and the physical limitations that should be applied to it and said that these were understandable but were "indicative of a level of fear of avoidance". She said that he was fit to perform full warehouse duties. She suggested that the recommendation that duties be rotated was "Ms. Fish being mindful of the Claimant's presenting symptoms while encouraging movement, exercise and correct working practices." She suggested that he would benefit from performing such duties as picking, whilst taking greater than average care to ensure full adherence to the rules and regulations of manual handling and avoid any tasks of the sedentary nature". She suggested that the Claimant "continues to adhere to advice, education, prescribed medication and any independent management plans". The Tribunal noted that the Claimant was in fact trying to adhere to advice, from his GP and his pain consultant, in the face of a contrary view from occupational health.

50. In April 2016 the Claimant received a letter from the Respondent congratulating him on his 100% attendance for the previous 26 weeks.

51. On 1 April 2016 the Respondent wrote to the Claimant inviting him to a disciplinary hearing on 11 April 2016, to be conducted by Mr Boland. The allegation was "breach of contract for failure to carry out your contractual duties and at no point have you intimated that you are prepared to try to carry out any of the recommended tasks. This is regarded as a gross misconduct offence within the disciplinary policy which if proven may result in your summary dismissal." The letter enclosed various notes of meetings and the Claimant's grievance letter and the complaint to the ethics department. The Tribunal noted that this was the first time that the Respondent had acknowledged receipt of the grievance letter. The letter reminded the Claimant that he had a right to be represented. It noted that towards the end of the letter "you have raised a grievance dated 14 March 2016 which I (HR) received on 21 March 2016 and a concern raised to the ethics team which will be picked up as part of your disciplinary hearing. As part of our disciplinary and grievance procedure it explains clearly (sic) that the grievance procedure should not be used to complain about the outcome of dismissal or disciplinary action." The Tribunal noted that the Claimant was not using the grievance process to complain about the outcome of dismissal or disciplinary action, neither of which had taken place at that point.

52. The disciplinary meeting took place on 11 April 2016, The Tribunal had the typed notes of that meeting. The Claimant attended with his trade union representative. The Claimant requested that his grievance be heard before the disciplinary process continued. He also requested that the disciplinary hearing should not be chaired by Mr Boland, because in February 2016 Mr Boland had questioned the Claimant about whether the Claimant might have an accident if he was put back on picking. It was not clear to the Tribunal why Mr Boland would have considered that it was necessary or appropriate to raise that matter with the Claimant when it had been discussed in a meeting when Mr Boland was not present. After an adjournment, Mr Boland decided that the meeting would be held by Mr Pitman, who would consider the disciplinary and the grievance at the same time. He explain to the Claimant that the medical advice was that he could do the job and that if the Claimant wanted to question that he should produce any new medical evidence that he had.

53. On 13 April 2016 the meeting took place with Mr Pitman. The Tribunal had the typed notes of that meeting. The Claimant again raised his point that his grievance should be heard before the disciplinary proceedings. After an adjournment Mr Pitman started the disciplinary hearing that day but said that he would not conclude it "as we need your grievance clarified and once clarified we need to ascertain who will hear it." The disciplinary part of the meeting then continued. The notes record that Mr Pitman considered that the Claimant's pain consultant's report contradicted the other medical advice from OH. He noted that the consultant had not suggested any particular weight that might cause strain to the Claimant's back. Once again, the Tribunal noted that this was because the Respondent had not obtained a formal report from the pain consultant, despite telling the Claimant that they wanted to do that back in September 2015; that would have answered all of their questions about performance of tasks, weights and so on.

54. The meeting was adjourned for Mr Pitman to review matters and to "ask more questions".

55. On 18 April 2016 the Respondent wrote to the Claimant setting out the history of the matter. The letter suggested that the Claimant had agreed with Mr Boland that the grievance would be included in the disciplinary proceedings and that he had changed his mind on 13 April 2016. Tribunal found it unlikely that the Claimant had agreed to hear both together as all along he had been quite clear that he wanted them to be considered separately. In any event, the letter set out that there would be a meeting to discuss and clarify the grievance on 21st April 2016.

56. That meeting took place with Mr Pitman and the Tribunal had the typed notes of that meeting. Mr Pitman confirmed with the Claimant that the grievance was against Mr Coker for not concluding the capability proceedings in September 2015; the Claimant declined to discuss the discrimination points (although it was unclear to the Tribunal that why he did that). In any event, Mr Pitman was satisfied that the main grievance was against Mr Coker and therefore a more senior person was necessary to hear it under the Respondent's grievance procedure. On 29 April 2016, the Claimant was invited by letter to a grievance hearing on 10 May 2016. The letter set out that the meeting would be conducted Mr Fielding, the general manager at

Didcot. It will be noted that as general manager he was at the same level of seniority as Mr Coker. The letter said that the disciplinary proceedings had been placed on hold until the grievance was concluded.

57. The Tribunal had the notes of the meeting on 10 May 2016. The Claimant attended with his trade union. He confirmed that the grievance was against Mr Coker. The Claimant asked why Mr Fielding was hearing the grievance given that he was a general manager and therefore not at the appropriate level of seniority. Mr Fielding suggested that the letter arranging the meeting had made it clear that it would be with him and he understood that the Claimant had said that he was happy for it to go ahead. He (Mr Fielding) had travelled some distance to attend this meeting. The Claimant was not happy to continue. After an adjournment Mr Fielding said that he would arrange for a senior director to consider the grievance as soon as possible. The Tribunal found that it was unreasonable of the Claimant to wait until the meeting itself to object to Mr Fielding, given that he must have known from the invitation letter that Mr Fielding had a lengthy journey to undertake.

58. On 17 May 2016 Mr Taylor, the senior director, wrote to the Claimant to say that he took grievances "really seriously and will ensure we complete a thorough investigation of your formal grievances that have been raised, discuss with yourself, give the outcome in writing, and give a right of appeal if you are not satisfied. Most importantly the grievance is dealt with in a timely way and referring to your ethical complaint, this is what you wished for also". Pausing there, the Tribunal noted that the grievance had not been dealt with in a timely way so far. Mr Taylor then set out some of the history of the grievance proceedings and said "I have looked at how hard the depot are working to ensure your grievances are heard in a timely way and would like to confirm that I would like you to attend your grievance hearing". The Tribunal reiterates that this had not been carried out in timely way thus far.

59. Mr Taylor continued "I am confirming due to my availability that I am appointing Richard Fielding to hear your grievance". He said that if the Claimant did not attend "I will inform Richard Fielding to conduct the hearing in your absence with the information he has at that point and conclude his findings in writing". The Tribunal noted that the Claimant was given a "take it or leave it" option. The Tribunal noted that there no indication of how or why Mr Taylor considered that he was able to breach the Respondent's grievance process in respect of a more senior manager hearing a complaint about a general manager.

60. A further letter was sent to the Claimant on 6 June 2016 inviting him to a grievance meeting with Mr Fielding on 13 June 2016.

61. That meeting took place and the Tribunal had the typed notes of that meeting. The Claimant attended with a trade union representative. He said that he was unhappy with the situation, but would proceed with the meeting. He was asked to give some details of his grievance which he did in brief terms, and suggested that there had been discrimination. Immediately, Mr Fielding is recorded as saying "Serious accusation to make, no evidence to back it up". That appeared to the

Tribunal to suggest that he was not approaching the matter with an open mind. However, the conversation then suggested that there had been a discussion about the discrimination accusation and it had been dealt with; the Tribunal could not understand that part of the notes but nevertheless any complaint of discrimination was left to one side and the other points of the grievance were discussed. Mr Fielding asked the Claimant what result he wanted. The Claimant said "I want to know why I was investigated for gross misconduct and what have I done. Darren Coker does not evidence (sic) and I want to stop the disciplinary again is what I want". The notes are not easy to understand, but the Tribunal found that what the Claimant was trying to convey was that he thought the disciplinary process had been incorrectly instituted, because his medical situation had not been properly investigated before the Respondent had decided that he was unreasonably refusing to carry out full duties.

62. The Tribunal found that this was not a case of the Claimant trying to use the grievance process to delay the disciplinary proceedings. He was using the grievance process to try to have the Respondent listen to his medical situation. The meeting was adjourned and Mr Fielding said he wanted to speak to "Carlo of GMB". In fact, he did not speak to Carlo; he interviewed Mr Watkins of HR and there is a note about their discussion. It appeared that Mr Fielding got some background from Ms. Watkins which he should have had before he met with the Claimant so that he could discuss that with the Claimant. He did not put any of the points raised by Ms. Watkins to the Claimant to seek his views. The following day Mr Fielding sent out his decision letter. He accepted that Mr Coker should have told the Claimant that the capability process had been abandoned because "the medical report changed the direction in the way in which you have been dealt with".

63. Mr Fielding considered that Mr Stone had made it clear to the Claimant in the follow up meeting that the capability process had ended. The Tribunal found that Mr Stone did not make this clear, according to the notes of that meeting. Mr Fielding noted that the depot believed that the grievance and disciplinary overlapped and could therefore be dealt with at the same time and the delay in responding to the grievance was due to Ms. Watkins being on holiday and dealing with the backlog of work on her return. He said "I believe the medical reports and job conditions are best raised as part of your ongoing meetings on site as potential mitigation. I am very conscious in hearing this grievance and not to influence any other hearing you are involved in (sic). He concluded that the site had "taken a couple of learnings (sic) from this process"; and that he had given specific feedback to Mr Coker and Ms. Watkins. He said that his opinion was that "with this grievance there was an aliment of delaying the process" (sic). He said that the outcome wanted by the Claimant was to stop the disciplinary, which would not happen. He set out the right to appeal.

64. The Tribunal found that in fact Mr Fielding had ducked out of considering the whole of the grievance, despite an earlier agreement that the grievance would be considered separately from the disciplinary proceedings. In Mr Fielding's witness statement, he said that he believed that the Claimant had helped his parents rebuild his house, but there was no evidence of that, and he said that he based that simply on his interpretation of the way Claimant reacted to a question about that. Mr

Fielding also suggested in his witness statement that the Claimant would have been happy to have left under the capability process because there would have been some financial benefit. Again, the Tribunal found that there was no evidence of that, in fact the evidence all along was the Claimant wanting to work and reiterated that in all of the meetings. He had a letter congratulating him for 6 months of 100% attendance. The Tribunal considered that Mr Fielding included those comments in his witness statement to try to discredit the Claimant and it indicated to the Tribunal that Mr Fielding considered that the grievance was a waste of time.

65. Given that Mr Fielding found that Mr Coker should have told the Claimant that capability proceedings had been concluded, that part of the grievance was upheld and the Tribunal found that this indicated that the grievance was not vexatious, neither was it a delaying tactic, it raised clear issues about which the Claimant was correct.

66. The Tribunal found that there was not a thorough investigation in respect of the grievance, as promised by Mr Taylor. Mr Fielding did not speak to Mr Coker; neither had he carried out any investigation apart from speaking to Ms. Watkins about the delay caused by the Respondent in the grievance process. If the Respondent had heard the grievance within 5 days as set out in their grievance policy, there would have been no delay at all.

67. The Tribunal found that the Claimant brought the grievance to show the Respondent that the disciplinary process was unreasonable and unnecessary in the light of the medical evidence.

68. By letter of 17 June 2016, the Respondent wrote to the Claimant in order to reconvene the disciplinary meeting. Before that meeting was to take place he was asked to attend the MSK clinic on 6 July 2016 for a clinical assessment “a method of understanding your current injury and identifying how this injury affects your physical activity levels in specific fine movement action”. The Tribunal was told that the MSK clinic was a new facility for the Respondent available from June 2016. The Tribunal noted that this indicated that Mr Pitman recognised that additional medical evidence was necessary in the case.

69. The Claimant was sick on 19 June 2016. Mr Stone made a note to say that he “reasonably believed that it was a premeditated absence”. It appeared to the Tribunal that there was no evidence to support that view and indeed the Claimant had not had any absences for at least 6 months and had been congratulated about that. The Tribunal found that this was an indication of the way in which managers viewed the Claimant.

70. The Claimant returned to work on 20 June 2016. There was a self-certification form showing that he had suffered from a sore throat and a headache and he was asked to complete a stress questionnaire. There was a further questionnaire which added migraine to the reason for the absence. The Claimant has written ‘(stress)’ next to migraine. There was no evidence that the Respondent took any action in respect of the stress questionnaire.

71. The Claimant appealed against the outcome of the grievance by letter of 23 June 2016. He pointed out again that the procedure had not been followed because Mr Fielding was the same level as Mr Coker. He pointed out that the part of his grievance about his health and well-being "was the main part of the grievance" but was not properly considered. He also referred to breaches of the Equality Act.

72. The letter inviting to the Claimant to the MSK clinic dated 23 June 2016 mentioned that the Respondent would provide the MSK assessor with a "brief explanation of your role at work" and the assessment will assist in "identifying limits and bio-mechanical compensation." It suggested that tests and discussions would take place. It said that "you may feel tired afterwards or have some soreness for a day or two after the assessment". That indicated to the Claimant that there would be some sort of physical activity expected at the assessment.

73. Mr Taylor replied to the Claimant's grievance appeal letter by letter of 24 June 2016. He acknowledged the letter and said that he had already explained to the Claimant that Mr Fielding had been appointed because he himself was not available. He reiterated that he would ensure that there was a thorough investigation and said "I would like to assure you that Richard will have listened to all your points and made an informed decisions (sic) based on the facts presented and the investigation completed". The Tribunal found that this indicated to the Claimant that Mr Taylor was not approaching his grievance appeal with an open mind. Once again, Mr Taylor had ignored the Respondent's grievance process, and although he suggested that it was most important that the grievance was dealt with "in a timely way" he failed to recognise that it had not been dealt with in that manner.

74. The Respondent's referral to the MSK clinic attached several notes about the Claimant over the years which were simply not relevant to his back pain. One of them, for example, showed that he was absent for a day because his wife was ill. Tribunal found that the purpose of appending all of those reports was in order to discredit the Claimant. In addition, in the questions raised by the Respondent to the MSK clinic it says " he is currently going through a disciplinary due to refusing to pick despite OH advice and other clinical reports stating that he is able to pick". The Tribunal noted that no other report said that the Claimant was able to pick and found this misleading. The next question raised by the Respondent was "can you see any medical evidence that states that he cannot pick" and the next question was "can he return to picking". A question was also asked whether a phased return was necessary and what plan would they put in place.

75. The assessment took place on 6 July 2016 and the MSK occupational health clinician Mr Claire produced a report on that day. He suggested that "the Claimant's medications may impact his ability to safely perform truck-driving duties" which had never been raised before. The clinical opinion was that the Claimant had a "series of concerns with regards to his back and the physical limitation that he should apply to it. These are understandable however are indicative of a level of fear avoidance. As he has received no specific diagnoses for the cause of his pain, he has been advised that he has been potentially experiencing mechanical back pain symptoms,

his current symptoms are indicative of possible pathology, muscular dysfunction and weakness of the lumber region, as well as probable core weakness which is contributing to his perceived pain levels. Clinical examination has established that he has limited range of motion on all movements which was restricted as a result of reported pain. Due to the substantially high reported pain levels and multiple red flags, this has severely limited his physical examination."

76. Pausing there, there was a dispute at the hearing that whether or not there had been a physical examination of the Claimant at this appointment. The Claimant said there had been none; the MSK report clearly says that there was a limited physical examination. The Tribunal was satisfied that this was not contradictory because it was clear from the report that the examination was abandoned at an early stage. Mr Claire recommended "an FCE assessment to safely objectively measure his current functional capacity, this assessment incorporates perceived exertion and compliance protocols as well as factoring in fear avoidance behaviours. Due to the limited physical examination and lack of recent intervention evidence I have been unable to clarify matters to advise definitive timescales for recovery as it is unclear what recent investigations and intervention this colleague has or is currently receiving. Due to this we need consent to write to his treating clinician to validate his treatment. Please can a consent form be completed and forwarded for my attention. If he requires further treatment, clarification of what treatment intervention is being utilised would permit recognition of an actual prognosis. Following the assessment contact was made with my manager highlighting the difficulties experienced during the assessment."

77. The Tribunal noted that the Claimant had been signed off from the pain clinic and so his "treating clinician" at this stage was his GP. The Respondent should have approached the pain consultant when the Claimant was still attending the pain clinic, but failed to do so. There was some discussion at the Tribunal about the meaning of "a level of fear avoidance." The Tribunal understood this to mean the avoidance of a task that might cause pain or further injury because of the fear of that pain. The Tribunal noted that Mr Claire at the MSK clinic found that to be "understandable" in the Claimant's circumstances.

78. On the 18 July 2016 the disciplinary hearing was reconvened before Mr Pitman. He noted that the Respondent was now waiting for the FCE assessment so he adjourned the meeting for that. The Claimant informed him that he was suffering from anxiety and stress, particularly in respect of the grievance appeal being delayed. The Tribunal noted that Mr Pitman himself referred to the "conflicting medical reports" in a letter of the same date following that meeting, Mr Pitman also confirmed in evidence that there were conflicting medical reports and he noted that the Claimant had said that the delay in hearing the grievance had caused him stress and family problems. The Tribunal found that it was difficult to understand why, when Mr Pitman himself recognised that the medical reports were conflicting, the Respondent did not simply terminate the disciplinary proceedings until further information was available. Mr Pitman noted that the Claimant had "refused the rehabilitation plan" but the Tribunal noted that the Claimant was never presented with a draft (or any) rehabilitation plan upon which he could comment.

79. On 20 July 2016 the Claimant began sick leave. His medial certificate described his conditions as “back pain, stress-related problems”.

80. On 22 July 2016, he was invited by letter to a meeting to discuss his current absence and company sick pay. The Tribunal accepted the Claimant’s evidence that before the meeting took place he was telephoned by Mr Stone and told that he will not be paid company sick pay in respect of his absence.

81. The Tribunal noted the provisions of the Respondent’s policy in respect of company sick pay. In particular, as far as withholding sick pay was concerned, the policy states that “under normal circumstances a fit note will be accepted for the purpose of company sick pay. If there is a question over the validity of any period of sickness, the manager must demonstrate reasonable grounds for this. The manager will fully investigate the circumstances.” Pausing there, the Tribunal noted that the Claimant had a certificate, or fit note, to say that he was genuinely unwell and unfit for work.

82. The policy goes on to say that managers must not withhold company sick pay except in the circumstances set out in the policy. One of the circumstances is “reporting sick during or pending a disciplinary hearing / investigation in gross misconduct cases only”. The process was that the circumstances should be discussed with the employee; if appropriate, medical advice should be sought; and advice should be sought from the general manager and people manager. The policy also reserves the right to withhold company sick pay if there was a genuine belief that the colleague was not sick.

83. The policy provides that the general manager is responsible for any authorisation of a decision to withhold company sick pay. “This would only be in exceptional circumstances”. There is a right of appeal.

84. The meeting took place with Mr Boland on 25 July 2016. The Tribunal had the written notes of that meeting. The Claimant was accompanied by his trade union. The Tribunal found that Mr Boland’s approach to the meeting was hostile. The Claimant explained that he was feeling stressed by the way he was treated by his employer and the way his grievance and disciplinary hearings were being handled. From the questioning, it appeared that Mr Boland did not have much information about that. He asked whether the Claimant had his medication with him, although the Claimant had not been asked to take any medication to that meeting. The Tribunal found that Mr Boland’s questioning implied criticism of the Claimant for not anticipating that Mr Boland would want to see his medication. Mr Boland asked the Claimant “how do you think staying off for a month will help”. He also said “I still don’t understand why you are absent from work”. Later in the meeting he said “how is you being off going to resolve the process and issues at work and fix your concerns”. The Claimant pointed out that it would not delay the process because they were waiting for the FCE examinations. The Tribunal found that Mr Boland’s approach generally demonstrated a fundamental lack of understanding of the Claimant’s medical condition and was challenging towards the Claimant. The

meeting was adjourned because the procedure required Mr Boland to make a recommendation to Mr Coker in respect of the decision on company sick pay. There were no notes about what Mr Boland had said to Mr Coker.

85. On 26 July 2016 Mr Coker wrote to the Claimant to say that the grievance and disciplinary hearings had been conducted in a timely manner, which the Tribunal found was certainly not the case. He commented that the Claimant had not taken his medication to the meeting with Mr Boland, and did not note that the Claimant had not been asked to do so. He said that the Respondent had offered "many support mechanisms to support you" and he noted that the Claimant had requested transport to all meetings because he was unable to drive because of his medication, and he said "I do not believe this to be necessary and it is your responsibility to be available and if needed to use public transport".

86. Mr Coker set out his decision that he would not pay company sick pay from 20 July 2016, because the Claimant had reported sick during a disciplinary process. He said "I believe that you have stalled the process to prolong the hearing and as we have tried to obtain further medical information to help us gather all the relevant medical information you have not been cooperative and you have now gone absent to support your disciplinary hearing" (sic). The Tribunal found that this was not a fair representation of what had happened to that date. The Claimant had not stalled the process; the delay at that point was due to the FCE examination being awaited. The Tribunal found that the Claimant had not "gone absent" to affect the disciplinary process. If that sentence, tortuous as it was, indicated that the Respondent did not believe that the Claimant was genuinely ill then the Tribunal rejected such an opinion; he had a medical certificate to support his absence.

87. The Tribunal noted that the Respondent's witnesses' evidence at the Tribunal hearing was initially that they believed the Claimant was ill but on closer questioning they became rather ambivalent about that and at one point Mr Coker suggested that the Claimant had gone on sick leave to avoid picking duties. Mr Boland told the Tribunal that the Claimant should have worked through his condition and that he was "not ill enough" for company sick pay to be paid to him. The Tribunal rejected all of those comments as being without any basis.

88. By letter of 27 July 2016, the Respondent confirmed to the Claimant that they would not hear his grievance appeal until after the FCE examination.

89. On 29 July 2016 the Claimant was sent a letter by the Respondent inviting him to a welfare meeting on 3 August 2016 because the Respondent was "concerned about you and would like to develop our understanding of the nature of your injury and treatment so that we are in a better position to support you in your return to health and work". The Tribunal noted that the end of the letter stated that "as per your terms and condition of employment, payment of company sick pay is subject to your attendance of this meeting". The Tribunal found that this indicated that company sick pay would normally be paid.

90. By letter of 3 August 2016, the Claimant appealed the decision to withhold his company sick pay. He suggested that the decision had been made because he had presented a grievance. He suggested that the Respondent had acted in breach of the procedures and had caused the delay themselves by not appointing the right seniority of manager. He also claimed victimisation in that letter.

91. The welfare meeting took place on 4th August 2016. a taxi was arranged for the Claimant to attend, notwithstanding that Mr Coker had previously said that he would not arrange transport.

92. On 5th August 2016, the Respondent wrote to the Claimant about the FCE assessment, arranging a pre-assessment telephone call for 19 August 2016 and the actual assessment on 1 September 2016. The letter said that that transport would be arranged for him to attend. By letter of 6 August 2016 the Respondent arranged the appeal against the withholding of company sick pay, to take place on 10 August before Mr Town, general manager at Erith depot.

93. The Tribunal had the typed notes of that meeting. The Claimant attended with his trade union representative. There was a discussion about the Claimant's grievance, although the Tribunal found that it was not relevant to the matter in hand. Mr Town then told the Claimant that if the capability proceedings had gone ahead "you would probably had been exited through capability". The Tribunal found that this indicated a hostile attitude on the part of Mr Town. Mr Town also told the Claimant that the MSK adviser had said that the Claimant had not been helpful. The Tribunal found that there was nothing in the MSK report to indicate that view. Mr Town also criticised the Claimant for not cancelling the grievance meeting with Mr Fielding before Mr Fielding had made the journey from Didcot on the first occasion. The Tribunal found that this was not a matter for Mr Town to be considering and again added to the hostile atmosphere at the meeting.

94. Mr Town suggested that the Claimant return to work with him at the Erith depot. The Claimant explained that he was unable to drive because of his medication. Mr Town challenged the problem with the medication and told the Tribunal that the Claimant had driven previously while taking that medication. He had to concede however, in cross examination, that he was unaware of the dosages of each type of medication and whether the dosage had changed. The Tribunal noted that this was another example of Mr Town jumping to conclusions. Mr Town also said to the Claimant "looking at you I struggle to see someone who is in so much pain MSK cannot assess you". Mr Town reiterated that view in evidence to the Tribunal. The Tribunal found that it was unclear how he could come to that assessment and again found that it indicated a hostile attitude towards the Claimant.

95. The reason for withholding company sick pay was said to be that he had delayed the proceeding, but the Claimant's sickness had not delayed the proceedings; that the delay was because the FCE assessment was awaited.

96. Mr Town told the Tribunal that one of the criteria had been met for withholding pay it was "usually always" withheld when an employee was sick during a

disciplinary process, but the Tribunal was not told of other cases which supported that view. The Respondent did not distinguish in this case between random self-certificated sicknesses and, as in the Claimant's case, illness supported by a medical certificate.

97. In his notes about the meeting, Mr Town suggested that taking sick leave was "a childish approach". Mr Town considered that the matter had gone on too long "most of which is because of you" and he did not feel it right to pay him company sick pay. In his evidence to the Tribunal, Mr Town suggested that it was necessary to resolve issues and that the Claimant's sick leave meant that he was avoiding issues.

98. The Tribunal found that Mr Town demonstrated a clear hostile approach to the Claimant and a lack of understanding of his medical condition.

99. By letter of 15 August 2016, Mr Town set out his decision to dismiss the appeal against withholding company sick pay. He went into great detail about the matters that the Claimant had raised about the disciplinary and grievance proceedings. He said "I actually see in your behaviours evidence that you are in fact trying to stall the process of being managed and I therefore feel you are creating a lot of your own stress. Examples of this will be the MSK clinic, the way you wouldn't proceed with the meeting with Richard Fielding and chose not to tell him until the meeting had started… the fact you never tried to resolve this with Darren in the first place and raised a grievance. I also feel you are unrealistic in your expectations…"

100. He suggested that he did not believe that it was the depot that was causing stress. He said that he would ask occupational health whether the Claimant could drive. The Tribunal considered that Mr Town should have done that and received a response before criticising the Claimant when he said he was unable to drive because of his medication. Mr, Town said "I do find this approach extremely immature and is not an adult way of trying the resolve the situation; I found your behaviour disappointing" in respect of the fact that the Claimant had gone on sick leave. Again, the Tribunal found that all of those comments demonstrated Mr Town's hostile attitude towards the Claimant. It was not clear to the Tribunal why, knowing that an FCE examination was due, the decision was not deferred until the results of that examination.

101. Occupational health did not answer the question about the Claimant being able to drive. The Claimant presented a further medical certificate on 18 August 2016, showing that he was signed off for 4 weeks with the same condition (back and stress).

102. On 19 August 2016, the Claimant did not respond to the telephone call from MSK which was to carry out a pre assessment check.

103. By letter of 20 August 2016, the Claimant resigned with immediate effect. He set out in some detail what he considered to be the reasons for his resignation and referred to the Respondent's handling of his grievance process. He suggested that withdrawing company sick pay was an act of discrimination/ repudiatory breach. He

noted that his grievance has not been dealt with in a timely manner, neither had his disciplinary meeting. He said that the Respondent had failed to make reasonable adjustments and had discriminated against him. He referred to the cumulative effect of the circumstances to date.

104. The Respondent in a letter of 23 August 2016 suggested that the Claimant reconsider his decision. The letter said that they had been offering support to understand his condition and "ascertain whether you are not capable of fulfilling your warehouse role or whether you don't want to fulfil the duties". The Tribunal found that if that question was still under consideration, then it was not clear why disciplinary proceedings had already commenced to look at the suggestion that the Claimant had deliberately decided not to undertake the full duties of his role.

105. The letter said that the points raised in the letter of resignation would be referred to Mr Taylor, who was to hear the Claimant's grievance appeal.

106. On 25 August 2016, a letter was sent to the Claimant from the Respondent about a vacancy for a clerical post. It was not clear to the Tribunal why this had been sent and no clear explanation was provided at the hearing. In any event, looking at the criteria attached to the letter, the Claimant would not be able to meet some of the criteria listed.

107. By letter of 5 September 2016, the Respondent invited the Claimant to the grievance appeal meeting with Mr Taylor. The meeting was originally to be on 12 September 2016, but was changed to 21 September 2016. The Tribunal noted that Mr Taylor had previously declined to consider the Claimant grievance because of his (Mr Taylor's) "availability" but it was apparent that he was able to provide dates for September meetings.

108. In the event the Claimant declined to attend and Mr Taylor, considered his appeal in his absence. Mr . Taylor sent a letter to the Claimant on 10 October 2016 rejecting the appeal and giving details for each of the point raise by the Claimant.

Submissions:

109. The representatives produced written submission and supplemented them by way of oral submissions. We do not repeat here the written submissions.

110. On behalf of the Respondent, Mr Meichen suggested that the Claimant's submission had tried to go beyond the issues set out in the case management order. He reiterated some of the evidence about the events that had occurred. He said that there had been no delay by the Respondent when Mr Fielding heard the grievance as he sent an outcome letter on the following day.

111. He submitted that it was relevant that the Respondent did not rush into the disciplinary process after the grievance was completed, but decided to get further medical evidence. He submitted that it was astonishing that the Claimant chose to

resign at the point that he did and he suggested that it was highly suspicious and tactical.

112. On behalf of the Claimant, Ms Bowen suggested that it was obvious at an early stage that the occupational health report conflicted with the reports that the Claimant had obtained and the Respondent should have recognised that rather than act on the premise that the Claimant was fit to carry out his full duties. She submitted that the Respondent's witnesses showed that they were frustrated with the Claimant objecting to the fact that the Respondent was not following the proper procedure.

113. She referred to the grounds of resistance which she said were clear that the Respondent believed that the Claimant could undertake full picking duties. She submitted that the Respondent had failed to follow the grievance procedure with regard to the seniority of the manager to hear the grievance, and the time limits. In fact, the grievance was partly upheld.

114. She submitted that she was not expanding the issues and that the Tribunal could look at the grounds of the complaints and proceedings which were relevant to the issues. She submitted that the Claimant had not lied about being in Nepal and accepted he had made a mistake when he first said he was there between May and August 2015.

115. She submitted that the Claimant was a credible witness who tried to help the Tribunal whereas the Respondent's witnesses lacked credibility and showed dislike for the Claimant.

The Law

116. Section 13 of the Equality Act 2010 deals with direct discrimination and provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

117. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.

118. Section 15 provides that A discriminates against a disabled person B if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply if A shows that he did not know and could not reasonably have been expected to know that B had the disability.

119. Section 27 of the Equality Act refers to victimisation. A victimises B if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act.

120. Protected acts include bringing proceedings under this Act; giving evidence or information in connection with proceedings under this Act; and making an allegation that A or another has contravened this Act.

121. Harassment is referred to under Section 26 of the Equality Act. A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating etc environment for B.

122. Section 19 makes provisions in respect of indirect discrimination. It provides that A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

123 The PCP is discriminatory if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim.

124. Section 20 and Schedule 8(20) make provisions with regard to the duty to make adjustments. The employer must apply a provision, criterion or practice which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. If so, the duty is to take such steps as it is reasonable to have to take to avoid the disadvantage.

125. This duty does not arise if the Respondent did not know, and could not reasonably be expected to know, that the person was disabled, or that he would be placed at a substantial disadvantage.

126. In the case of the Environment Agency v Rowan [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

(a) the provision, criterion or practice applied by the employer;

(b) the identity of non-disabled comparators where appropriate; and

(c) the nature and extent of the substantial disadvantage suffered by the Claimant.

127. The extent to which an adjustment would remove the disadvantage is a relevant factor. The Tribunal should consider whether there is a 'real prospect' of an adjustment having that impact. There is no requirement that it should be 'completely effective'.

128. Guidance on the Equality Act has been issued in the EHRC Code of Practice on Employment. Paragraph 6.28 lists 'some of the factors which

might be taken into account when deciding what is a reasonable step for an employer to have to take'. These factors include effectiveness, practicability and cost. One of the examples given in paragraph 6.33 is 'altering the disabled worker's hours of work'.

Time Limits

129. Section 123 of the Act provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.

130. For the purposes of this section, conduct extending over a period is to be treated as done at the end of the period.

Burden of Proof

131. The burden of proof in respect of these provisions is contained in Section 136. It provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that A contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for a Claimant to prove facts from which the Tribunal could, apart from the relevant section, conclude in the absence of an adequate explanation that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that they did not commit that act.

132. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.

Unfair Constructive Dismissal

133. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, Lord Denning said

"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intended to be bound by one or more of the essential terms of the

contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."

134. In the case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

135. That test was confirmed in the case of **Malik v BCCI [1997] IRLR 462**, by the House of Lords.

136. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see **Lewis v Motor World Garages Limited [1985] IRLR 465**).

137. In the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

138. In the case of **Bournemouth University v Buckland (EAT0492/08)**, the EAT confirmed the test in the case of **Malik v BCCI,** that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper

cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. The Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows;-

(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
(ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

139. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was *an* effective cause of the resignation; it does not have to be *the* effective cause.

140. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

141. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances.

142. It is useful to note two other decisions. In **Morrow v Safeway Stores plc [2002] IRLR 10**, it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.

143. In **Croft v Consignia plc [2002] IRLR 851**, the EAT held that "the implied tem of trust and confidence is only breached by acts or omissions

which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the 'industrial jury' ".

Conclusions

144. Having made the findings of fact set out above and having considered the relevant law, we returned to the list of issues in order to draw these conclusions.

145. We decided to begin with the disability claims. The Respondent had conceded that the Claimant was a disabled person, by reference to his back condition.

146. The first claim was whether the Claimant had been treated unfavourably because of something arising in consequence of his disability. The Claimant relied upon three matters. We first considered the first matter, whether the Respondent had refused to make reasonable adjustments to his duties. We noted that since 2011 the Respondent had made reasonable adjustments in that the Claimant was not required to carry out picking duties. During the capability, disciplinary and grievance procedure that flowed through 2015 and 2016, there was no change to those reasonable adjustments.

147. Although the Claimant's reasonable adjustment claim itself refers to three possible adjustments, there was very little evidence about targets or retraining.

148. The Tribunal considered that there was no refusal by the Respondent to make reasonable adjustments at the material time, such that would amount to unfavourable treatment. The Respondent was looking into the medical evidence to see whether restricted duties were appropriate. They did not take any action in respect of any failure by the Claimant to meet his targets. There was no evidence that retraining had been refused. The Tribunal concluded that it could not be said that there had been refusals to make reasons adjustments.

149. The next matter relied upon was whether the Respondent has subjected the Claimant to heavy-handed and intimidatory disciplinary and capability proceedings. The Tribunal concluded that they had done so and described in the findings of fact the number of meetings which were conducted by the Respondent's managers which demonstrated the hostile attitude towards the Claimant. The Tribunal concluded that the medical

situation should have been fully clarified before the Respondent decided whether this was a capability case or a disciplinary case. Despite asking for the Claimant's consent, the Respondent never obtained a report from his pain consultant and they never did carry out the recommended work place assessment. The Tribunal concluded therefore that he was treated unfavourably in that regard.

150. The third matter under this heading was whether he was treated unfavourably in respect of the withholding of company sick pay. The Tribunal consider that withholding was unfavourable treatment as it put the Claimant at a financial disadvantage.

151. The Tribunal therefore had to decide whether the way in which the disciplinary and capability proceedings took place, and the decision to withhold company sick pay, happened because of something arising in consequences of his disability, and in this regard the Claimant relied upon his inability to carry out picking duties.

152. The Tribunal concluded that the Respondent had subjected the Claimant to heavy-handed and intimidatory disciplinary and capability proceedings because he was unable to carry out picking duties. The whole process flowed from his inability to carry out these duties. He could not carry out those duties because of his disability.

153. With regard to company sick pay, the company sick pay was withheld because the Claimant went on sick leave during the disciplinary process, but the disciplinary process was instigated because he was unable to carry out picking duties and the Respondent perceived, based on contradictory medical advice, that the Claimant would not carry out those duties, although he never refused outright to do so and the Respondent never gave him a properly drawn up rehabilitation plan so that he could see what was envisaged.

154. Those two matters amounted to unfavourable treatment because of something arising in consequence of the Claimant's disability.

155. The next question was whether that unfavourable treatment was a proportionate means of achieving a legitimate aim. The Tribunal concluded that it could not be proportionate to undertake meetings in a heavy-handed and intimidatory manner, however legitimate an aim might be. As far as the company sick pay was concerned, there was a legitimate aim which was to prevent delay in disciplinary proceedings where questionable sick leave was taken. However, the Respondent did not use proportionate means in this case because they were, at the stage they made the decision about the company sick pay, waiting for the FCE assessment and they knew that the Claimant had told them that he was starting to feel stressed and then he had a medical certificate which confirmed that was one of the reasons why he

was unfit for work. The Respondent's witnesses told the Tribunal that they did not doubt the Claimant's sickness was genuine, although some of their comments appeared to cast out on that.

156. The section 15 claim was partly successful.

157. The next claim was indirect discrimination. The first question was whether the Respondent applied a PCP that employees were expected to carry out 100% of their contractual duties. The Tribunal concluded that such a PCP was applied by the Respondent. The Tribunal rejected the Respondent's submission that the wording should include a reference to reasonable adjustments. The next question was therefore whether that PCP placed disabled person at a particular disadvantage. No particular disadvantage was pleaded and it was not explained by the Claimant. In any event, the Tribunal considered that a disabled person would be entitled to reasonable adjustments if they were adversely affected by any PCP. The Tribunal concluded that the pleadings were not clear on what was the disadvantage relied upon, and that claim was unsuccessful.

158. The next claims were claims under section 13, direct discrimination; and section 26, harassment; and referred to the three matters relied upon in the section 15 claim, plus a fourth matter that he was subjected to unpleasant meetings where he was threatened with disciplinary action. It seemed to the Tribunal that the fourth matter to be considered largely echoed the second matter relating to heavy-handed and intimidatory disciplinary and capability proceedings.

159. The first question was whether the Respondent acted in that manner. This has already been decided as set out above. As far as the new matter was concerned, the Tribunal concluded that the Respondent had subjected him to unpleasant meetings where he was threatened with disciplinary action and they did so in a hostile atmosphere.

160. Looking firstly at whether he was subjected to heavy-handed and intimidatory proceedings and subjected to unpleasant meetings because of his disability, the Tribunal considered how a hypothetical comparator who was unable to undertake picking duties would have been treated. The Tribunal considered that the Respondent would have followed the same procedure and possibly would have adopted the same approach. It appeared to the Tribunal that the Respondent's managers all had a very similar attitude towards an employee's inability to carry out part of their duties. The Tribunal concluded therefore that the Claimant was not treated in that way because of his disability. As far as the other matter was concerned, the withholding of company sick pay, the Tribunal concluded that this was not because the Claimant was disabled; it was because of the blinkered approach adopted by the Respondent's managers in using the criteria in the

Respondent's policy and failing to see the bigger picture. The Tribunal consider it likely that they would have treated a hypothetical comparator in the same way.

161. The section 13 claim was accordingly unsuccessful.

162. Turning then to the claim of harassment on the same grounds, the Tribunal considered the way in which the proceedings and meetings were handled. The Tribunal found that some of the comments made at the meetings related to stress, which was not the disability relied upon by the Claimant. However, there were other comments, particularly by Mr Town, such as referring to the Claimant not looking as if he were in pain in respect of his back condition and being deliberately unhelpful to the MSK in respect of his back condition, neither of which had any basis in fact, which the Tribunal concluded did amount to unwanted conduct and which was related to his disability. The Tribunal concluded that it was entirely reasonable for the Claimant to consider that those unwanted comments, relating to his disability, created a hostile atmosphere for him.

163. With regard to the withholding of company sick pay, the Tribunal concluded that although this was unwanted conduct, it was not related to the Claimant's disability. As set out above, it was the result of the blinkered approached by the Respondent's managers.

164. Turning to the claim of failure to make reasonable adjustments, the PCP was the same as that relied upon in the indirect discrimination claim and are set out in that claim. The Tribunal had found that the PCP was applied by the Respondent.

165. The substantial disadvantage at which the Claimant was placed, compare to non-disabled persons, was said to be the disciplinary and capability proceedings, the events leading to constructive dismissal, and stress and anxiety. The Tribunal considered that the indirect result of the PCP was to place the Claimant at that disadvantage because the entire events flowed from that expectation.

166. As the question of knowledge had been conceded by the Respondent, the Tribunal then considered whether the Respondent had taken reasonable steps to avoid that disadvantage such as modifying the Claimant's duties to avoid picking duties; amending his targets; and retraining / redeploying him. The Tribunal concluded that the Respondent had taken reasonable steps to avoid disadvantage during the course of the disciplinary and grievance proceeding because they had made reasonable adjustments in respect of the picking duties and the Claimant was not expected to carry out those duties at that time. Those reasonable adjustments continued throughout the

process. It is right to say that the Respondent was proposing, possibly, at the end of the process to withdraw those reasonable adjustments, but was prepared, albeit somewhat tardily, to consider additional medical evidence by way of the FCE assessment.

167. The Tribunal concluded that the claim was unsuccessful.

168. The Tribunal considered the victimisation claim next. The Respondent conceded that the Claimant's grievance of 14 March 2016 was a protected act. The Claimant said he relied on another grievance, but he only needed to have one protected act to start the process under this section. The other grievances fall outside the time period that the Tribunal was considering. The question therefore was whether the Claimant suffered detriments because of that protected act, namely the disciplinary and capability proceedings and the decision to withhold company's sick pay.

169. The Tribunal noted that the capability proceedings began before the Claimant presented his grievance and therefore the grievance could not have been a cause of those proceedings. The Tribunal also noted that Mr Moller at his meeting with the Claimant told the Claimant that he would refer the matter to a disciplinary process and again, that was before the grievance was presented. The grievance/protected act could not therefore have been a reason for that decision.

170. Lastly, in respect of any detriment caused by the company sick pay decision, the Tribunal noted that the grievance presented by the Claimant was discussed at the meeting concerning the decision about company sick pay. It was referred to at some length by Mr Town at the meeting and in his decision letter. He said in his letter that the grievance had "extended the process" and in other meetings and in letters the Respondent referred to the grievance "delaying the process". The Tribunal found that was not accurate. The Respondent had delayed the process by failing to provide the appropriate level of manager to hear the grievance and the Claimant was not unreasonable to insist that the procedure be followed. In addition, the Respondent did not acknowledge the grievance for some time and failed to follow the time frame set out in the grievance procedure. The Tribunal concluded that the detriment relating to company sick pay was caused because of the protected act, because it featured so largely in the managers' consideration of that decision.

171. With regard to the time limit, the Tribunal concluded that there was evidence of conduct extending over a period of time up until the Claimant's resignation. There was a series of decision made by managers involved in the Claimant's case.

172. The Tribunal then considered the claim of unfair constructive dismissal. The Claimant relied upon four matters which he said constituted a breach of the implied term of trust and confidence. The Tribunal had concluded that there had been no refusal to make reasonable adjustments to the Claimant's duties. However, the Tribunal had concluded that the Respondent had subjected him to heavy-handed and intimidatory disciplinary and capability proceeding; the Respondent had caused extreme delay to the consideration of the Claimant grievances, in breach of the ACAS code and in breach of the Respondent's own grievance procedures; and as a final straw they had withheld company sick pay which decision, although discretionary, had no persuasive basis in this case.

173. The Tribunal concluded that the three breaches identified were repudiatory and demonstrated a very poor handling of the process by the Respondent that continued for months. The context was the Claimant's poor health and his dogged pursuit of the Respondent's procedures, which the Respondent seemed to ignore. Instead, they labelled the Claimant as "obstructive".

174. The Tribunal considered that the cumulative affect of the hostile way in which the Respondent handled the proceedings both in terms of capability, disciplinary and grievance, and the unreasonable manner in which the discretion was exercised in respect of company sick pay, amounted to a breach of trust and confidence.

175. The Tribunal accepted the Claimant's argument that the decision to withhold company sick pay amounted to a final straw. There was no sensible basis for the way in which the Respondent exercised their discretion to withhold payment.

176. The Tribunal concluded that the breach of trust and confidence by the Respondent was the cause of the Claimant's resignation. The Respondent suggested that the cause was that he wanted to avoid the FCE examination. However, the Tribunal could not agree, and noted that he had attended all other medical examinations and had attended all meetings and complied with the Respondent's instructions, but that he had lost hope of a fair procedure once company sick pay was withheld. The Respondent also suggested that he had resigned in order to avoid the disciplinary process, but the Tribunal noted that at all stages the Claimant himself was urging the Respondent to move on with the process to alleviate his stress. The Tribunal concluded that the cause of the resignation was the unsatisfactory way in which the Respondent had handled his case.

177. As far as any delay was concerned, there was no delay by the Claimant. He received the letter in respect of his appeal of the decision to withhold company sick pay around 16 August 2016. He presented his resignation letter on 20 August 2016, at a time when he was unwell and signed off work. There was no delay that indicated any waiver of breach.

178. There was therefore a constructive dismissal. The Tribunal had to decide whether it was fair or unfair in all the circumstances. The Respondent suggested that it was fair because of the Claimant's conduct which they labelled "obstructive". The Tribunal was satisfied for all the reasons set out in the findings of fact that he was not obstructive. He just wanted the Respondent to follow their own procedure and to obtain proper medical advice. It was the Respondent that caused the delay. He did not refuse to carry out the duties that he had been undertaking for some five years. Ultimately, he went on sick leave but before that he had been working as normal. That was in the context of the Respondent failing to obtain a workplace risk assessment, failing to approach the pain consultant despite asking the Claimant's consent to do so and failing to draw up a detailed rehabilitation plans so that the Claimant could see what was specifically being proposed.

179. The Tribunal concluded that there were no potentially fair grounds for dismissal and that the constructive dismissal was accordingly unfair.

180. Lastly, the Claimant claimed his notice pay. Given that the Respondent acted in breach of his contract, he was entitled to his notice pay, which may appear as part of any compensation for unfair constructive dismissal. The Tribunal is not aware of the date when the Claimant's pay ceased, but that will be a matter to decide at the remedy hearing.

181. If the parties are unable to agree a settlement in respect of the successful claims, they should write to the Tribunal office to seek a date for a remedy hearing, setting out the time estimate, within 28 days of the date that this reserved judgment with reasons was sent to the parties.

Employment Judge Wallis
7 August 2017